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Once Released Irrigation Waters: Liability and Litigation

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ONCE-RELEASED IRRIGATION WATERS: LIABILITY AND LITIGATION

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INTRODUCTION

An inevitable outgrowth of the widespread utilization of irrigation in the Western United States has been the question of litigation regarding damage caused by seepage or drainage of excess waters from government recalamation projects onto adjoining lands. The problems remain unavoidable because of the basic engineering or irrigation, *infra,* unsettled due to the relative lack of case law on the subject, *infra,* and further complicated by the various notions of ownership, and resultant liabilities of the water, *infra.* The question remains who is liable and to what extent.

THE FACT SITUATION

Western irrigation projects ordinarily begin with a dam and a resultant artificially created reservoir. The water backed up within the reservoir is then pumped through pipes up and into a "feeder canal"[1] whereupon it is delivered into an "equalizing reservoir."[2] The equalizing reservoir is at an appreciably higher elevation than the original reservoir to enable the water to flow by gravity to the irrigable lands of the project. Subsequently, through an ever-widening web of "subsurface channels"[3] and drainage ditches, the water filters down into the arid lowlands where it is ultmately delivered to the private landowner, usually at a "headgate."[4] At this point the landowner may receive an excess amount of water so as to preclude an uneven application and to insure a complete irrigation of his lands. This surplus water must also seek its lowest point and drains off of the irrigated property as either "surface seepage"[5] or "subsurface percolation."[6] Hopefully, these waters are cap-

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[1]FEEDER CANAL—engineering term referring to a sluice or ditch carrying water from one reservoir to another reservoir.

[2]EQUALIZING RESERVOIR—engineering term referring to a water storage facility constructed for the purpose of raising the elevation of stored water to allow for its future transportation by gravity for later use on lands located at lower elevations.

[3]SUBSURFACE CHANNELS—water courses which lie wholly beneath the surface of the ground, allowing subterranean waters to flow in a permanent and regular but invisible course. Black's Law Dictionary, Fourth Edition, 1951, p. 1762.

[4]HEADGATE—diversion gate usually located at the highest elevation of an irrigated tract of land and used for controlling the amount of water flowing onto such tract.

[5]SUFACE SEEPAGE; SEEPAGE—waters which diffuse themselves over the surface of the ground, following no defined course or channel½ and not gathering into or forming any more definite body of water, and gradually spreading out over lower ground. Black's Law Dictionary, Fourth Edition, 1951, p. 1762.

[6]SUBSURFACE PERCOLATION; PERCOLATION—waters which do not form part of the body or flow, surface or subterranean, of any stream, and which slowly filter through the soil moving by gravity in any and every direction along the line of least resistance. Samuel Wiel, "Water Rights in the Western States," Volume II, 1911, p. 1027.

tured and channeled as "return flows"[7] for subsequent, lower arid land areas. As a necessary consequence, however, waters once applied will percolate through the ground and accumulate in the substrata of some lower, adjoining landowner and eventually render that property unstable.

The results are manifest: ruination of the inundated property, landslides, and fixture damage, to mention a few.[8] The injured landowner seeks redress for his injuries. The irrigation projects or districts through the Bureau of Reclamation, Department of Interior, deny any responsibility for the water after its delivery to the headgate of the user. The issues are joined and the controversy defined. The question becomes: What are the remedies available to the landowner?

ADMINISTRATIVE RELIEF UNDER THE PUBLIC WORKS FOR WATER ACT

Initially, the aggrievd party may seek relief through the available administrative machinery, in this case the Public Works for Water, Pollution Control and Power Development and Atomic Energy Commission Appropriation Act, 1973, and its predecessors. These Acts authorize payment out of reclamation funds for "damages caused to the owners of of lands or other private property of any kind by reason of the operations of the United States, its officers or employees, in the survey, construction, operation, or maintenance of irrigation works."[9] Under its operating statute and its predecessors, however, an award may be made only upon a showing that the damage was the direct result of nontortious activities of the Bureau of Reclamation.[10] Moreover, the difficulties in establishing seepage from project canals as the "direct result" of the injury further limit the possibility of administrative relief under this Act.[11]

As applied to the instant situation, in order for the claimant to recover, it must appear from the record that some activity of the Bureau of Reclamation through one of its irrigation districts was the "direct cause" of the damage complained of. That is, that the Bureau's activities, without contribution from other sources, were sufficient to cause the damage complained of. Usually, the ultimate deleterious effects are

[7]RETURN FLOWS—general movement of all waters, both surface and subsurface, channelized or diffused by gravity to a point of lower elevation.

Representatives of the Interior Department expect the frequency of cases similar to the one under discussion to increase as their various irrigation projects continue to reach the point of soil saturation.

[9]87 Stat. 318, Pub. L. No. 93-97, 93rd Cong. (1973).

[10]39 Ops. Att'y Gen. 425, 428 (1940); Northern Pacific Railway Company, et al., T-560 (Ir.) (May 10, 1954); Harold D. Jensen, TA-227 (Ir.) (March 14, 1963); 70 I.D. 97 (1963); E. L. Brindle, T-P-540 (Ir.) (December 28, 1967); and Appeal E. L. Brindle, TA-449-4-71 (Ir.) (June 15, 1970); C. V. Moon, T-P-662 (Ir.) (March 20, 1970).

[11]The "direct result" has been defined as a cause without which the injury would not have occurred and which by itself is a self-sufficient cause of the injury. Christman v. United States, 74 F.2d 112, 114-115 (7th Cir. 1934); Northern Pacific Railway Company, et al., *supra* note 10.

caused by irrigation water after application or by seepage or percolation from a Bureau or non-Bureau source or by some combination of the above. If a factor other than Bureau activities is sufficient by itself to cause the damage, then any effect of water from Bureau structures by legal definition becomes an "indirect cause" for which no recovery may be allowed.[12]

Bolstered by the narrow definition of "direct cause," the Solicitor has concluded that when a claim is made that seepage water from a Bureau irrigation structure has damaged private property, it is not necessary in denying the claim under the Public Works Appropriation Acts to have a finding as to the source of the water causing the damage. Rather, there need only be a finding based on the evidence that the damage was not the direct result of nontortious activities of the Bureau of Reclamation.[13] It must be concluded, therefore, that the restricted scope of compensable injuries and the attendant problems of proof have worked to diminish the chances for purely administrative relief.[14]

Even if it can be established that the particular damage complained of comes under the purview of the Act, there is still no absolute right of recovery. The Interior Department, while noting the broad statutory language in allowing for such claims, has stated that payments under the Act are discretionary with, and not mandatory upon, the Secretary of the Interior.[15] Each decision, therefore, is merely a manifestation of Department policy with, significantly, heavy weight given by the Solicitor to the findings and recommendations of the local Bureau of Reclamation officials. For the reasons stated, a review of the cases indicates that, with certain minor exceptions, liability under the situation posed here is usually denied under the Act.[16]

Finally, since the remedy under the Act has been labeled by the

[12]Isabelle S. Gordon, T-616 (Ir.) (March 4, 1954).

[13]Harold D. Jensen, *supra*, note 10; 39 Ops. Att'y Gen. 425 (1940), *supra* note 10.

[14]Another problem faced by the claimant seeking recovery based upon the Appropriation Act is the amount of damages alleged. Under a majority of the cases, 28 U.S.C. § 2675(b), (1948) is interpreted as limiting recovery in an action under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (1948), to the amount of the claim before the agency. Siciliano v. United States, 85 F.Supp. 726, 731-732 (D. N.J. 1949); Smith v. United States, 239 F.Supp. 152, 154-155 (D. Md. 1965); But *cf.* dismissal of claim; Franzino v. United States, 83 F.Supp. 10 (D. N.J. 1949). Since the damage incurred in our situation is usually a continuing one, the claimant faces the option of either asserting a lower but stable amount (which might be more favorably considered by the Interior Dept.) or, to avoid the limitations of 28 U.S.C. § 2675(b), *supra*, of claiming continuing damages (which, in turn, stands a greater chance of denial by the agency). By virtue of the language cited in 28 U.S.C. § 2675(b), applicable cases are faced with a factual determination of whether the amount in excess of the original claim meets one of the two grounds allowed in the statute. A survey of the cases fails to suggest a ready relationship in this regard. *See e.g.*, United States v. Alexander, 238 F.2d 314 (5th Cir. 1956); and Phillips v. United States, 102 F.Supp. 943 (E.D. Tenn. 1952).

[15]60 I.D. 451, 454 (1950); Sol. Op. M-36064. The Interior Department has delineated certain guidelines, however, to be observed in deciding these cases. 24 Fed. Reg. 1877, 1878 (1959).

[16]*Cf.* Bertha Theobald, T-569 (Ir.) (June 30, 1954).

Solicitor as gratuitous only, the Interior Department denies the right of any judicial review from its purely statutory-based decision.[17] While the claim may be considered at the administrative level on other grounds such as the Federal Tort Claims Act,[18] or the Tucker Act,[19] both of these forms of relief usually are pursued judicially.[20]

JUDICIAL RELIEF UNDER THE FEDERAL TORT CLAIMS ACT

By far the most commonly used remedy in an action by the injured landowner for damages is the Federal Tort Claims Act. [21] Indeed, as a necessary prerequisite to recovery under the Federal Tort Claims Act, the claimant must have initially presented his claim to the Interior Department as the appropriate agency for a prior, final administrative decision.[22]

Assuming the injured landowner has avoided the rather narrow statute of limitations[23] afforded by the Tort Claims Act, the initial question becomes whether liability exists under the law of the state where the tortious act occurred.[24] This poses particular problems for the claimant since the question of liability of waters once released to the land-

[17]Although there are no reported decisions regarding this contention, it nevertheless remains the policy of the Interior Department.

[18]28 U.S.C. §§ 1346(b), 2671-2680 (1948).

[19]28 U.S.C. §§ 1346(a)(2), 1491 (1948).

[20]Any variances as between the administrative and judicial levels will be noted, however.

[21]*Supra* note 18, affording the federal district courts exclusive jurisdiction of civil actions on claims against the United States, for money damages for ". . . injury or loss of property . . . caused by the negligence or wrongful act or omission of any employee of the Government while acting within the scope of his office of employment under the circumstances where the actions, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred . . . ." 28 U.S.C. § 1346(b) (1948). In addition, the Federal Tort Claims Act waives the Government's historic immunity from suits of this sort in tort. United States v. Yellow Cab Co., 340 U.S. 543, 547 (1951).

[22]28 U.S.C. § 2675(a) (1948) as amended July 18, 1966, Pub. L. No. 89-506 § 2, 80 Stat. 306; Beavers v. United States, 291 F.Supp. 856, 857 (S.D. Tex. 1968); Cambridge Forest Apartments, Inc., v. United States, 307 F.Supp. 1191, 1192 (N.D. Ga. 1969). Interestingly, since recovery under the Federal Tort Claims Act requires a prior disposal of such claim at the agency level, the claimant is faced at that stage with asserting the same causative acts of the Bureau of Reclamation to be simultaneously both tortious (to satisfy the requirements of 28 U.S.C. § 2675(a)) and nontortious (to recover under the Appropriation Act). The Interior Department apparently, however, will consider each ground for recovery separately. *See* explanatory cases cited *supra* note 3.

[23]28 U.S.C. § 2401(b) (1948). Claims arising after January 18, 1967, must be brought to the Interior Department within two years after the claim accrues, or to the federal district court within six months after the Interior Department reaches its decision. Such limitations are jurisdictional, *Davis v. Foreman*, 239 F.2d 579 (7th Cir. 1956), *cert. den.* 353 U.S. 930, *reh. den.* 353 U.S. 968; *Simon v. United States*, 244 F.2d 703, 704-706 (5th Cir. 1957); and cannot be waived, *Munroe v. United States*, 303 U.S. 36, 41 (1938); or enlarged by contract, *Adams v. Albany*, 80 F.Supp. 876, 881 (S.D. Calif. 1948). State law determines when as well as whether a claim comes into being. However, federal law controls on the initiation of the running of the limitation period. Kossick v. United States, 330 F.2d 933, 935 (2d Cir. 1964), *cert. den.* 379 U.S. 87 (1964).

[24]Ravonier, Inc. v. United States, 352 U.S. 315, 319 (1957).

owner introduces the possibility of a break in the causal connection necessary to establish a cause of action in tort under the Act.

LIMITATIONS UPON LIABILITY THROUGH STATE LAW

Although there is scant case law on the subject, among a few jurisdictions there exists a body of law which specifically absolves the irrigation district from any liability for damages effected by the return flows after the delivery of the water to the headgate of the landowner. Unless and until recapture is effected, the liability of the district as a carrier must cease after delivery to the private user.

Lisonbee v. Monroe Irr. Co.[25] represents the first decision holding the water supplier immune in this situation. Leaving open the possibility of liability for negligently maintained canals,[26] the court stated:

> . . . [T]he canal companies . . . had the right to conduct water through their ditches and to deliver so much as was necessary for the irrigation of the lands of . . . other persons, and if, in consequence of improper and negligent irrigation, the proprietors of such lands allowed it to escape onto the lands of other persons to their injury, such proprietors would be liable to such other persons for such negligence and not the canal companies, without fault.[27]

More than thirty years passed before *Spurrier v. Mitchell Irr. Dist.*[28] appeared as the next reported decision. The Court again held in favor of the water supplier, but on slightly different grounds. After flatly labeling the irrigated district a common carrier, the court concluded:

> . . . [T]he irrigation district being a common carrier of water from the point of appropriation of the stream to the place of delivery to the owner of the land . . . is not liable . . . for any damage resulting from the lawful application of said water to the land by the owners thereof, or for incidental damage to another caused by seepage.[29]

The same court considered the very question two years later in *Omaha Life Ins. Co. v. Gering and Ft. Laramie Irr. Dist.*[30] In favoring the irrigation district, the court based its decision this time on the *Lisonbee* theory of control of the waters. The court noted:

> The use of the water, after delivery, was a matter over which district had no control. The district is not liable for damages for negligence resulting from a use of the water for irrigation, which use is not subject to its control.[31]

[25]18 Ut. 343, 54 P. 1009 (1898).

[26]". . . [C]anal companies . . . should conduct their surplus waters . . . in suitable ditches to the source of supply when practicable, or to otherwise control them so they will not injure the property of other persons. . . . Such ditches should be adequate and suitable to carry such surplus . . . allowed to collect . . . so that it may not escape onto the adjoining lands of other persons to their injury." *Id.* at 1010. *See also* North Point Consol. Irr. Co. v. Utah & S.L. Canal Co., 16 Ut. 246, 52 P. 168, 172-174 (1898). Such negligently caused seepage presumably would be sufficient grounds for recovery in an action under the Federal Tort Claims Act.

[27]Ravonier, Inc. v. United States, *supra* note 24, at 1009.

[28]119 Neb. 401, 229 N.W. 273 (1930), overruled in Snyder v. Platte Valley Public Power and Irr. Dist., 144 Neb. 308, 13 N.W.2d 160 (1944) but on other grounds.

[29]*Id.* at 277.

[30]123 Neb. 761, 244 N.W. 296 (1932).

[31]*Id.* at 297.

The fourth and final judicial determination[32] in the area came two years later in Arizona. Finding corroboration for its decision in *Omaha Life, supra,* the court in *Salt River Valley Water Assn. v. Delaney*[33] held the duty and liability of the water supplier simply ceased at the headgate or point of delivery.

The metamorphosis of the above-mentioned cases represents no particular refinement of a particular legal theory. In all four decisions the courts avoided any esoteric reasoning to support their conclusions. The irrigation districts were absolved of liability because they did not control the instrumentality which caused the damage. In reading the *Lisonbee* decision, it is apparent that the court reached its finding solely upon the merits of the facts before it,[34] but not so in the later cases, especially *Spurrier.* In that case the court, after paying homage to the traditional notions of liability based upon the rules of negligence, went on to justify its decision on wider, policy considerations as well. The Nebraska Supreme Court took cognizance of the importance of the success of irrigation for the continued well-being of its citizens, even noting that such policy was specifically mentioned in the Nebraska Constitution.[35] After declaring that the irrigation district was not an insurer within the meaning of *Fletcher v. Ryland,*[36] the court went on to add:

> It is a matter of common knowledge that thousands of acres of arid or semi-arid land in the western part of this state have either been reclaimed or improved by means of irrigation. Here, as in other states wherein irrigation is practiced extensively, the rule of the common law and the state law, and the decision of the courts applicable to waters and water courses have been found inimicable to the public interest, so dependent upon productive agriculture, made possible by the development of irrigation projects. Our Constitution, our statutes and the decision of our courts all challenge our attention to the desirability as well as the necessity for the modification of these rules. Indeed, so different are the problems and so different are the conditions that in the western states the rules regulating irrigation have a prevailing tendency toward practicalism.[37]

The water supplier found additional immunity in the extra-judicial considerations of encouraging widespread irrigation as a matter of public policy. So long as the irrigation districts continued to serve the public

[32] *Brulotte* v. *United States,* Civil No. 744 (E.D. Wash., December 17, 1953), an unreported decision, dealt with this problem in its consideration of defendant's motion for summary judgment. In granting the motion the court based its granting of the motion on the discretionary function exception to the Federal Tort Claims Act.

[33] "The defendant without authority to manage and control the water after its delivery at the headgate or to oversee and keep the ditch clean, could not . . . be held liable for the . . . consequential damages." 44 Ariz. 119, 39 P.2d 626, 635 (1934).

[34] The court, in holding the irrigator liable, observed: "If such water flows upon the surface of irrigated lands onto adjoining lands of another, to his injury, the person whose negligence causes or permits it must respond in damages." *Supra* note 18 at 1010.

[35] "The necessity of water for domestic use and for irrigation purposes in the State of Nebraska is hereby declared to be a natural want." Neb. Const., art. 15, § 4.

[36] *See also* MacKay v. Breeze, 72 Ut. 305, 269 P. 1026, 1027 (1928). Fletcher v. Rylands and Horrocks, 159 Eng. Rep. 737 (1865), *rev.* in Fletcher v. Rylands, L.R.I. Ex. 265 (1866), *aff'd.* in Rylands v. Fletcher, L.R. 3 H.L. 330 (1868).

[37] *Supra* note 28 at 276.

purpose, they were entitled to protection. What the court in *Lisonbee* did not envision and in *Spurrier* did not consider was the continuing claim by the irrigation districts to the right of recapture of all excess waters after their initial application. As the demand for more irrigation projects grew and the supply of water became more precious, the Bureau of Reclamation was forced to rely increasingly upon the use of excess waters to satisfy the neeeds of the lower-lying areas.

The prerogative of recapture was largely predicated upon the notion of continued ownership of the water by the districts. But along with the advocacy of unbroken title to the water came inroads upon the concept of immunity from liability after its temporary release to the landowner. Since, under the prevailing engineering practices described above, seepage of excess waters is an inevitable by-product, the owner of the causative instrumentality, knowing of such inevitable side effects, would be barred under the normal rules of negligence from denying liability in this situation. Moreover, should not the policy considerations of granting carte blanche to the irrigation districts be limited now that it was evident that each irrigator was purchasing, along with his water, a potential lawsuit with his lower-lying neighbor?

All of the problems incumbent with forming a balancing of the interests of the irrigators and the landowners might not be so difficult, however, were it not for the contention that the irrigation districts continued to own the waters. The prniciple of ownership does not lend itself neatly to our question.

Ownership of the Water

Problems incident to the right of the United States to recapture and use or sell return excess flows through seepage after use of the land for irrigation first reached the Supreme Court in *Ide v. United States*,[38] where the landowner contended that the Government having sold the water had no right to the seepage. In rejecting this argument, the court said:

> A further contention is that the [United States] sell the water before it is used, and therefore has no right in the seepage. But the water is not sold . . . the [United States] invests each . . . [landowner] . . . with a right . . . to irrigate his land, but it does not give up all control over the water or to do more than pass to the . . . [owner] . . . a right to use the water so far as may be necessary in properly cultivating his land. Beyond this all rights incident to the appropriation are retained by the [United States].[39]

The strong language so clearly recognizing the right of recapture seemed to form the basis for a claim of ownership of the waters. But this was not to be the case.

[38]263 U.S. 497 (1924).

[39]The court also pointed to the policy considerations noted in the discussion under the *Spurrier* decision to justify its opinion. The court observed: "A second use in accomplishing . . . reclamation and cultivation of all of the lands within the project . . . is as much within the scope of the appropriation as a first use is. The state law and the National Reclamation Act both contemplate that the water shall be conserved that it may be subjected to the largest practicable use." *Id.* at 505-6.

Thirteen years later in *Ickes v. Fox*,[40] the Supreme Court declared that although the United States diverted, stored, and distributed the water, it did not become vested with ownership of the water. Rather, the opinion went on to label the Government simply a carrier and distributor of the water.[41] Paralleling the use of policy in its reasoning (as in *Spurrier* but for a different result), the Supreme Court first observed that the appropriation of the water was made not for the use of the Government, but, under the Reclamation Act, for the use of the landowners. It then concluded:

> The federal government as owner of the public domain, had the power to dispose of the land and the eater . . . [T]he right to the use of water can be acquired only by prior appropriation for a beneficial use; and that such right when thus obtained is a property right which, when acquired for irrigation, becomes . . . by express provision of the Reclamation Act . . . part and parcel of the land upon which it is applied.[42]

Further clouding of the issue occurred in *United States v. Tilley*[43] when the Eighth Circuit stated that the United States retained a sufficiently appropriative interest to enable it to protect its water despite the ownership by the landowners of the water rights. Thirteen years later *Hudspeth County Conservation and Reclamation Dist. v. Robbins*,[44] relying on *Ickes v. Fox*, declared that, even though the United States appropriated and impounded the water, it did not become the owner of the water in its own right. The court continued by stating that the rights of the United States as a storer and carrier were not exhausted upon delivery but extended to recapture and reuse of such waters.[45]

Viewed in this context, the question of ownership of the water can only be misleading. If, for example, the right of continued use was disputed, the water was deemed to belong to the users and the Government was merely a carrier.[46] If the United States brings an action to prevent waste, however, the courts have found sufficient interest to allow the Government to maintain the action.[47] So long as seepage of excess waters occurs as an inevitable event in irrigation projects and until the Government is ready to acquiesce in the notion that it has no right to control

[40]300 U.S. 82 (1937).

[41]*See also* Murphy v. Kerr, 296 F.Supp. 536, 544-555 (D. N.Mex. 1923); Snow v. Abalos, 18 N.Mex. 681, 140 P. 1044 (1914); Nevada County & Sacramento Canal Co. v. Kidd, 37 Cal. 282 (1869); Swank v. Sweetwater Irr. & Power Co., 15 Ida. 333, 98 P. 297, 299 (1908).

[42]Ickes v. Fox, *supra* note 40 at 96-97.

[43]124 F.2d 850 (8th Cir. 1941), *cert. den.*, 316 U.S. 691 (1941).

[44]213 F.2d 425, 428 (5th Cir. 1954), *cert. den.*, 348 U.S. 833 (1954). *See also* Nebraska v. Wyoming, 325 U.S. 589, 615 (1944).

[45]*See also* J. B. Bean, et al. v. United States, 143 Ct. Cl. 363, 374, *cert. den.*, 358 U.S. 906 (1958), wherein the court stated that a beneficial use of waters alone gives the user no vested right to them.

[46]Ickes v. Fox, *supra* note 40.

[47]United States v. Benett, 207 F. 524 (9th Cir. 1913); United States v. Union Gap Irrig. Co., 209 F. 274 (E.D. Wash. 1913); 2 Clarke, Water and Water Rights, Sec. 117.3 at 176 (1967).

the use of these waters after delivery, it appears that courts will find that the Government's responsibility for the water's effects does not end at the point of delivery.

Assuming the Government does not raise the defense of non-liability of waters once released to the landowner, the road to recovery based upon tort remains open but difficult. Whether or not the irrigation project has acted in a culpably negligent manner is, of course, determined by the local law.[48] Some jurisdictions label such projects as purely public corporations and, absent express consent or statutory provision,[49] immune from tort liability; but the prevailing view is away from such immunity and toward a decision predicated upon the presence or absence of negligence. Most courts, therefore, have required a project to exercise ordinary care and caution in the construction, operation, and maintenance of their works. The amount of care is usually defined as that which a reasonably careful and prudent person, acquainted with the conditions, would exercise under like circumstances.[50]

THE DOCTRINE OF *Res Ipsa Loquitur*

As an adjunct to tort liability, the doctrine of *res ipsa loquitur* may be applied.[51] If the injury was caused by the failure of project works, where such malfunction would not ordinarily occur without negligence, and the irrigation district had exclusive control and management of such works and superior means of information concerning the circumstances surrounding the failure of the specific instrumentality,[52] liability would exist. Since water once released leaves the physical control of the irrigation project and passes to the landowner, however, the district can usually defeat the doctrine by successfully pleading either of two defenses: a lack of exclusive control over the causative instrumentality,[53]

[48]28 U.S.C. § 1346(b) (1948); *Rayonier, Inc. v. United States, supra* note 24 at 319, wherein the court also noted that even though liability might not exist under applicable state law, an action may still be maintained under the Act since the United States has been held to waive the immunities as a public entity that it might have under state law.

[49]*See* Whiteman v. Anderson-Cottonwood Irrig. Dist., 60 Cal. App. 234, 212 P. 706, 710 (1922).

[50]United States: Garden City Co. v. Bentrup, 228 F.2d 334, 336-337 (10th Cir. 1955); Arizona: Taylor v. Roosevelt Irr. Dist., 71 Ariz. 254, 226 P.2d 154, 156 (1960), *aff'd*, 72 Ariz. 160, 232 P.2d 107; California: Nahl v. Alta Irrig. Dist., 23 Cal. App. 333, 137 P. 1080, 1081-1082 (1913); Colorado: North Sterling Irrig. Dist. v. Dickman, 59 Colo. 169, 149 P. 97, 98 (1915); Idaho: Albrethson v. Carey Valley Reservoir Co., 67 Ida. 529, 186 P.2d 853, 856, 858 (1947); Montana: Fleming v. Lockwood, 36 Mont. 384, 92 P. 962, 963 (1907); Nebraska: Hilzer v. Farmer Irr. Dist., 156 Neb. 398, 56 N.W.2d 457, 460-462 (1953); Oregon: Parada v. United States, 420 F.2d 493, 495 (9th Cir. 1969); Utah: Knight v. Utah Power and Light Co., 116 Ut. 195, 209 P.2d 221, 225 (1949); Wyoming: Longmire, et. al. v. Yelm Irr. Dist., 114 Wyo. 619, 195 P. 1014-1015 (1921).

[51]Local law controls regarding questions of the applicability of the doctrine of *res ipsa loquitur* in an action under 28 U.S.C. §§ 1346(b), 2671-2680, *White v. United States*, 193 F.2d 505, 507 (9th Cir. 1951).

[52]*See e.g.*, Clark v. Icicle Irrig. Dist., 72 Wash.2d 212, 432 P.2d 541, 542-543 (1967).

[53]United States v. Kesinger, 190 F.2d 529, 531-532 (9th Cir. 1951); Freed v. Inland Empire Insurance Co., 154 F.Supp. 855, 857-858 (D. Wash. 1957).

or the lack of a causal connection between the instrumentality and the ultimate injury.[54]

Finally, although irrigation districts are under a duty to act reasonably, they are not insurers against damage. They are liable only in cases where negligence in the construction, maintenance, and operation of its works can be demonstrated.[55] Moreover, absolute liability is not a proper basis for suit under the Federal Tort Claims Act.[56]

DISCRETIONARY FUNCTION EXEMPTION

By far the most important consideration and the most difficult hurdle to recovery under the Tort Claims Act is the discretionary function exemption.[57] The decisions here indicate a bifurcation into two general categories: (1) damage caused by the very undertaking of the project itself; and (2) damage caused by some negligence in the execution of the project. As to the former category, it appears well-settled that the basic decisions relating to a project fall within the purview of the discretionary exception. Thus, since fundamental decisions of location, size, date, and method of operation cannot be seen as creating liability under the Federal Tort Claims Act,[58] a project could presumably rely on the very basic engineering requirement for excess flows and, accordingly, claim immunity from any damage caused by such waters seeping or percolating onto the lands of adjoining landowners. To recover, the claimant, on the other hand, must strive to label the causative factor as having arisen out of the operational phases rather than the planning stages of the particular project.[59]

Since courts, in making this distinction, often refer to the particular level of Government where the discretion is made,[60] it behooves the injured party to link as much of the damage as possible to the operational

[54]United States v. Ridolfi, 318 F.2d 467, 471-472 (2nd Cir. 1963).

[55]California: Ceuci v. Palo Verde Irrig. Dist., 69 Cal. App.2d 583, 159 P.2d 674 (1945); Colorado: North Sterling Irr. Dist. v. Dickman, 59 Colo. 169, 149 P. 97, 98 (1915); Montana: Fleming v. Lockwood, 36 Mont. 384, 92 P. 962, 963 (1907); Utah: West Union Canal Co. v. Provo Bench Canal and Irrig. Co., 116 Wash. 128, 208 P.2d 1119, 1122 (1949).

[56]Dalehite v. United States, 346 U.S. 15, 44 (1953), *reh. den.*, 346 U.S. 841; Strangi v. United States, 211 F.2d 305, 308 (5th Cir. 1954); United States v. Ure, 93 F. Supp. 779 (D. Ore. 1955), *rev.* 225 F.2d 709, 713 (9th Cir. 1955); Huffmaster v. United States, 186 F. Supp. 120 122 (N.D. Cal. 1960). With regard to the doctrine, it is interesting to note *United States v. Ure, supra* note 56 at 711, stated the principle of *res ipsa loquitur* was defined as "merely a modern version of the application of the principle of absolute liability . . . ." which is not a proper ground for suit under the Tort Claim Act.

[57]28 U.S.C. § 2680(a) (1948).

[58]Coates v. United States, 181 F.2d 816, 817-819 (8th Cir. 1950); United States v. Ure, *supra* note 56.

[59]*Guy F. Atkinson v. Merritt, Chatman and Scott Corp.*, 126 F. Supp. 406, 409 (N.D. Cal. 1954) wherein the court pointed out that more evidence was necessary to establish if the pertinent decision were made by the government, and to establish whether the building of the project resulted from executive and legislative discretion in authorizing the entire project or was a "mere job of work" incidental to a discretionary decision to construct the whole project.

[60]Dalehite v. United States, *supra* note 56.

rather than the engineering, planning, and construction aspects of the project.[61] Factually, the claimant must seek a determination that the damage was caused by a ministerial activity concerned only with the negligent execution of the operational details of a larger legislative program.[62] This would include, for claimant's purposes, the allowance of water to accumulate, lack of inspection, interference with underground water, and draining up and releasing waters, to mention a few.[63]

The discretionary exception has undergone some restrictive interpretation by the courts. Where under the language of early decisions[64] almost any project activity could be termed discretionary, the courts formerly limited the exemption to decisions involving location and sizes of canals or ditches and basic policy determinations regarding maintenance of the project.[65] Subsequently, however, a policy shift in this area may have been signaled in *United States v Hunsucker*[66] wherein the court termed the methodology chosen to drain federal lands as not falling within the exemption. Such decision, the court concluded, was not discretionary within the meaning of 2680(a) since it was ancillary only to a prior discretionary determination to clear the federal lands. The court further noted that, although the decision to clear the land was made at a high level, the particular aspect of drainage was made by lower-level, local officials.

Whether *Hunsucker* can be used by an injured landowner to avoid the discretionary exemption will ultimately depend upon the facts of each case on a *sui generis* basis. Certainly, decisions made solely by the local project managers which are not "directly and vitally related" to the entire governmental irrigation program will no longer be protected—even if that decision was made at the so-called planning stage rather than at

[61]*People of the State of California v. United States,* 146 F. Supp. 341, 344 (S.D. Cal. 1956) wherein, in denying liability, the court emphasized the planning as an aspect of discretion even though such resultant decisions might have been erroneous.

[62]*Desert Beach Corp. v. United States,* 128 F. Supp. 581, 584 (S.D. Cal. 1955) wherein the court, in denying exemption under 28 U.S.C. § 2680(a), stated while the building of the canals at a certain place or in a certain way might have been discretionary, they could not agree that the negligent *maintenance* of the canals was a discretionary function or duty. (Emphasis supplied). But not that the court in so holding relied on *Ure v. United States, supra* note 56, where the district court, in allowing recovery under the Act for damages resulting from a break in an irrigation canal, rejected the contention that the construction, maintenance, and operation of such a canal had a discretionary governmental function. But the judgment in *Ure v. United States* was overruled in *United States v. Ure, supra* note 56, on the grounds the claims were barred by the discretionary function exception of the Act.

[63]In this regard, it is interesting to note that the court in *United States v. Ure, supra* note 56 at 712, observed that eleven years of successful operation rebutted any inference that the inspections during construction were conducted negligently. Such rationale could also be used to avoid an inference of liability in the operational and functional aspects as well.

[64]Dalehite v. United States, *supra* note 56; Coates v. United States, *supra* note 58.

[65]United States v. Ure, *supra* note 56; California v. United States, *supra* note 61.

[66]314 F.2d 98, 103-105 (9th Cir. 1962).

[67]Actions brought in tort are not recoverable in an action for a taking. Stover v. United States, 204 F. Supp. 477, 484 (N.D. Cal. 1962), *aff'd,* 332 F.2d 204, 206 (9th Cir. 1964), *cert. den.,* 379 U.S. 922.

the local level. By labeling a discretionary act as merely a manifestation of a higher-originating discretionary policy, the injured landowner may well avoid this hitherto formidable stumbling block.

JUDICIAL RELIEF UNDER THE TUCKER ACT

Liability apart from negligence[67] may still exist for the injured party in the form of a constitutional claim for a taking of property for a public use without just compensation under the Tucker Act.[68] A successful labeling of a loss incurred by the landowner as a "taking" immediately negates the necessity of proving negligence. Moreover, since the action is not dependent upon the Federal Tort Claims Act, the discretionary exemption is not available to the project. As the cause for a taking under the Tucker Act is based upon a constitutionl right[69] as defined in the Fifth Amendment, there is no need to initially exhaust all administrative remedies before going to court. There is, however, no prohibition from raising and adjudicating the issue up to a $10,000 judgment at administrative level.[70] Additionally, there is a six-year statute of limitation as compared to a two-year term for claims brought under the Federal Tort Claims Act.[71] To constitute a valid claim, however, the United States acting through its irrigation districts must "take" the plaintiff's property and not merely damage it.

It must be remembered that a landowner faces but one catastrophic event that sudenly injures his land. Assuming the cause of said damage can be traced to the seepage or percolation of the excess waters received by his higher-situated irrigated neighbor (which is no easy task to prove), the injured party must still establish that the resultant loss of property constituted the taking of an easement only.[72] A taking requires the showing of a permanent invasion of the land amounting to an appropriation of, and not merely an injury to, the property,[73] since the mere incidence of occasional damage is an insufficient predicate to allow compensation.[74] To be sure, a landslide or inundation of the low-lying landowner

[68]28 U.S.C. §§ 1346(a), 1491, *supra* note 19.

[69]*United States v. Causby*, 328 U.S. 256, 257 (1946) wherein the court stated, "... if there is a taking, the claim is founded upon the Constitution."

[70]Tucker Act cases for less than $10,000 may be brought in the district courts as well as the court of claims, 28 U.S.C. § 1346(a)(2). However, any claim under the Act in excess of $10,000 must be brought in the court of claims, 28 U.S.C. § 1491; Ove Gustavson Contracting Co. v. Floete, 278 F.2d 912, 914 (2nd Cir. 1960), *cert. den.*, 314 U.S. 694. Interestingly, a study of the administrative cases reveals very few examples where a taking was alleged at the agency level. One probable reason is the still relative ignorance of the procedures and rules of the court of claims and a reluctance to bring suit in that forum for claims exceeding $10,000 in amount.

[71]28 U.S.C. § 2401(a) (1948) for claims arising under the Tucker Act; and 28 U.S.C. § 2401(b) (1949) for claims arising under the Federal Tort Claims Act.

[72]United States v. Causby, *supra* note 69 at 266; Myers v. United States, 323 F.2d 580, 583 (9th Cir. 1963).

[73]Sanquinetti v. United States, 264 U.S. 146, 149 (1924). Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time. United States v. Dickinson, 336 U.S. 745, 748 (1947).

[74]The essential inquiry is whether the injury to the claimant's property is in the nature

causes him damage; but whether that damage is a taking appears uncertain.[75]

Even if a court finds a taking, a plaintiff may still find himself without a remedy. A landowner is entitled to be put in no better position than he was before the taking,[76] since just compensation does not include enhancement arising from the project, and for which the land was taken.[77] The primary consideration becomes, therefore, whether the market value of the land has actually increased due to the project.[78] Consequently, the enhancement accuring from the irrigation project to the landowner may

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of a tortious invasion of his rights or rises to the magnitude of an appropriation of some interest in his property permanently to use of the government. This test ably supports the notion that damage which is the incidental result of lawful government action is consequential and does not constitute a taking under the Fifth Amendment. Huges v. United States, 241 U.S. 351, 362 (1916); United States *ex rel.* TVA v. Powelson, 319 U.S. 266, 281 (1943); Manifatti v. Springs, 199 U.S. 473, 483-486 (1905); Sanquinetti v. United States, *supra* note 73 at 149-150. Further, the United States under the Fifth Amendment is not required to pay for consequential damage. Mitchell v. United States, 267 U.S. 341, 344 (1925); United States v. Petty Motor Co., 327 U.S. 372, 377-378 (1946).

[75]*United States v. Cress*, 243 U.S. 316 (1917) might be used by the landowner to support the proposition that it was the intent of the project to subject his land to a permanent liability and this constituted a taking of an easement. This case goes on to observe, however, that, ". . . it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking . . . and . . . where the government by the construction of a dam . . . so floods lands . . . as to substantially destroy their value there is a taking . . . ." at 328. Whether this represents the situation of our landowner is doubtful.

Columbia Orchard v. United States, 116 Ct. Cl. 348, might also be used by the plaintiff, along with *Peabody v. United States*, 231 U.S. 530 (1913), to support the proposition that the ultimate fact question is one of the defendant's intent; is there an intention to take plaintiff's property, or an intention to do an act the natural consequence of which was to take its property. *North Counties Hydroelectric Co. v. United States*, 170 Ct. Cl. 241 (1965), is also useful to the claimant in support of the contention that the instant case must turn on the question whether or not the effect of the project was to impose a permanent liability to intermittent but inevitably recurring inundations. *National By-Products v. United States*, 186 Ct. Cl. 570 (1969), contains discouraging language, however, where the court observed that, "Not all floodings caused . . . by . . . governmental activities amount to a taking . . . . The courts have held that one, two, or three floodings by themselves do not constitute a taking. The plaintiff must establish that flooding will inevitably recur." at 576-577. In our situation there usually is but one injurious act.

Finally, *Richard v. United States*, 152 Ct. Cl. 266 (1960) might be cited by the plaintiff as authority for the notion that he need establish only that such liability (permanent liability for intermittent overflows) exists, and that the taking was a natural and probable consequence of the acts of the defendant. *National By-Products*, however, contains additional language distinguishing "permanent liability to intermittent but inevitably recurring overflows and occasional floods induced by governmental projects which have been held not to be takings . . . [and such distinction] . . . is not a clear and definite guideline. This is understandable since the rule is really an application to this particular situation of the general principle that the government is not liable under the Fifth Amendment for consequential damages arising from the carrying on of its lawful activities . . . ." at 577.

[76]United States v. Rands, 389 U.S. 121, 126 (1967); United States v. Birnbach, 400 F.2d 378, 382-383 (8th Cir. 1968).

[77]Bauman v. Ross, 167 U.S. 548, 574, 584 (1897); United States v. Miller, 317 U.S. 369, 375-377 (1943).

[78]United States v. Miller, *supra* note 77 at 375-377; United States v. Reynolds, 397 U.S. 14, 16-18 (1970); United States v. Trout, 386 F.2d 216, 221 (5th Cir. 1967).

well render the issue of whether there was an actionable taking a moot point.[79]

CONCLUSION

The remedies available to the landowner whose property is damaged by seeping irrigation waters are plainly inadequate. Whereas in the past irrigation districts saw their task as solely one of delivery, there must be a realization that along with supplying the water must go a modicum of responsibility for what the water does after acceptance by the landowner. Perhaps this concern might surface as a renewed technological effort to change the engineering techniques so as to mollify the now inevitable results. Another alternative might be a decision to recognize a form of absolute liability in this situation. So far the courts and legislatures have avoided making this determination. It is clear, however, that without some recognition of their plight, landowners may well fail in seeking redress for an obvious wrong.

[79]The injured landowner might contend that since his property was within the scope of the irrigation project, the after-value of his land should not be offset by the enhancement from any benefits derived from the project.

The Fifth Amendment provides that private property shall not be taken for public use without just compensation. And just compensation means the full monetary equivalent of the property taken. Monongahela Nav. Co. v. United States, 148 U.S. 312, 324-326 (1892). In enforcing the Constitutional mandate, the court at an early date adopted the concept of market value: the owner is entitled to the fair market value of the property at the time of the taking. Kerr v. South Park Commissioners, 117 U.S. 379 (1885). But with this basic measurement of compensation has been hedged certain refinements developed over the years in the interest of effectuating the Constitutional guarantee. The Supreme Court has long recognized that the market value of the property can be adversely or favorably affected by the imminence of the very public project that makes the taking necessary. Shoemaker v. United States, 147 U.S. 282, 302 (1892). And it was perceived that to permit compensation to be either reduced or increased because of an alteration in market value attributable to the project itself would not lead to the just compensation that the Constitution requires. United States v. Virginia Electric and Power Co., 365 U.S. 624, 631-636 (1960). Moreover, the development of a public project may also lead to enhancement in the market value of neighboring land that is not covered by the project itself. And if that land is later taken, whether for an extension of the existing project or for some other public purpose, the general rule of just compensation requires that such enhancement in value be wholly taken into account, since fair market value is generally to be determined with due consideration of all available economic uses of the property at the time of the taking.

The Supreme Court in *United States v. Reynolds, supra* note 78, gave full articulation to these principles: "If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement. The question then is whether the scope of the project from the time the Government was committed to it included the public lands. If they were not, but merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the owner of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that lands probably would be condemned. The owner ought not be allowed to gain by speculating on probable increases in

value due to the Government's activities. We think the test of the scope of the project was stated with admirable clarity being unanimous in *United States v. Miller*, 317 U.S. 369 (1940): 'If the lands were probably within the scope of the project from the time the Government was committed to it,' no enhancement in value attributable to the project is to be considered in awarding compensation. As with any test that deals in probabilities, its application to any particular set of facts requires discriminating judgment.'' Reynolds, *supra* at 16-18.

The courts have gone both ways. In *John L. Roper Lumber Co. v. United States*, 150 F.2d 329, 331 (4th Cir. 1945), the court, citing *United States v. Miller, supra*, concluded that ''had the boundaries of the original project been definitely delineated or fixed by the Act of Congress authorizing the project, then the lands might be considered merely adjacent . . . and would be entitled to the unearned increments . . . [T]hat, however, was not true here . . . [T]he scope of the project was of a rather nebulous nature . . . [F]urther, a large amount of discretion was . . . [given] . . . as to the particular needs and locations . . . . In *Scott v. United States*, 146 F.2d 131, 134, however, the court held the opposite, that enhancement was due because ''. . . [O]n meager evidence as to the original scope of the project, we incline to think the enlargement . . . [of a military housing development] . . . was not then in contemplation.'' The court rationalized that the sudden increase in personnel after the unexpected declaration of war was an unforeseen event and, therefore, was not within the original scope of the project.

The rule does not require a showing that the land ultimately taken was actually specified in the original plans for the project. It need only be shown that during the course of the planning or original construction, it became evident that land so situated would probably be needed for the public use. Whether the injured landowner can successfully claim that his land was not within the scope of the project as defined is highly doubtful, *Scott v. United States*, notwithstanding.